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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THRESHOLD.TV, INC.,

Plaintiff and Appellant,

v.

MONOWISE, LTD. et al.,

Defendants and Respondents.

B172532

(Los Angeles County
Super. Ct. No. BC279094)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul Gutman, Judge. Reversed with directions.

Girardi & Keese, Thomas V. Girardi, Howard B. Miller, and Shahram A. Shayesteh for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Matthew P. Kanny, L. Peter Parcher, and Orin Snyder for Defendants and Respondents.

I. INTRODUCTION

Threshold.TV, Inc., formerly known as Threshold.Com, Inc. (plaintiff), appeals from a dismissal entered following entry of an order granting judgment on the pleadings in favor of Monowise, Ltd. (Monowise), John Osbourne, who is also known as Ozzy Osbourne, and Sharon Osbourne (collectively, defendants).¹ The core allegations of the complaint are: Monowise, a partnership of which the Osbournes are partners, entered into an agreement with plaintiff involving the Internet; the agreement also provided that plaintiff had the right to non-Internet related “Additional Exploitations” subject to the parties’ mutual approval; the agreement twice indicated that neither party could unreasonably withhold their consent to plaintiff’s right to pursue the Additional Exploitations; an unidentified employee of plaintiff suggested the development of a “live action family based TV show”; Ms. Osbourne, one of the partners of Monowise, refused to participate in such a program because she was not interested in having television cameras in the Osbourne residence; and following the conversation where Ms. Osbourne indicated she was not interested in the concept, defendants entered into an agreement with MTV, a codefendant who is not a party to this appeal, to produce the exact same program suggested by plaintiff. This course of events plaintiff alleges violated its rights under the Additional Exploitations provisions of the agreement. The trial court found plaintiff had failed to state causes of action for contract breach, unfair competition, and declaratory relief against the defendants. We respectfully disagree and reverse the judgment of dismissal. We direct the trial court

¹ We construe the notice of appeal from the nonappealable order granting a judgment on the pleadings motion as from the judgment of dismissal subsequently entered. (Code Civ. Proc., § 904.1; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 144, fn. 1, affd. (1996) 517 U.S. 735, 747; *Campbell v. Jewish Com. for P. Service* (1954) 125 Cal.App.2d 771, 772-773.)

to vacate its order granting judgment on the pleadings as to defendants Monowise and the Osbournes, and to enter a new order denying that motion.

II. BACKGROUND

A. The Intellectual Property Rights Agreement

On December 13, 2000, plaintiff entered into an “Intellectual Property Rights Agreement” with Monowise. Ms. Osbourne signed the agreement (including the incorporated “Standard Terms and Conditions,” which are discussed below) as Monowise’s owner. The complaint alleges that Monowise is a California partnership and that Mr. and Mrs. Osbourne are its principals. Pursuant to the Intellectual Property Rights Agreement, Monowise granted plaintiff specified rights with respect to the “Property” in the “Field.”

The “Property” was defined as follows: “Ozzy Osbourne’s name, likeness, image, identity, persona, trademarks and right of publicity, and all intellectual property connected with the concert tour known as ‘Ozzfest,’ including without limitation all artwork, designs, trademarks, performances, promotional materials and all other intellectual property used therein or connected therewith owned or controlled by [Monowise]. Additionally, where [Monowise] controls and has not granted to Artist Direct and/or Signatures Net, the names, likenesses, images, identities, personas, trademarks and rights of publicity of all artists or other individuals performing or providing other services as part of or in connection with Ozzfest.”

The “Field” was defined as follows: “The medium now known as the Internet and all other ‘online,’ interactive or digital media or formats now known or hereafter developed, including without limitation satellite delivery, cable (CATV) network, including cable modems or set-top boxes, terrestrial broadcast or other terrestrial transmission, DVD, DVD-ROM, or other storage medium, wireline telephone

network, for example using DSL, wireless telephone network, mobile or cellular telephone or data network, or any narrowband, broadband or wideband network using any method of data transmission, but only as it relates to the ‘internet.’ Does not include what is currently known as traditional, offline exploitation, including but not limited to theatrical film, broadcast television, non-interactive cable television and videotape/DVD.”

The Intellectual Property Rights Agreement further provided: “This confirms the agreement between [Monowise] and [plaintiff] with respect to the exclusive license by [Monowise] to [plaintiff] of the rights in and to the Property for use and exploitation, directly and through license or sublicense to others, in the Field and in the [entire world]. This Agreement incorporates and is subject to [plaintiff’s] Standard Terms and Conditions of License, as set forth on Exhibit A hereto.”

B. The Standard Terms and Conditions

The incorporated “Standard Terms and Conditions” further set forth the parties’ rights and obligations. Pursuant to the Standard Terms and Conditions, Monowise granted plaintiff, “All rights to commercially exploit the Property, and any elements therefrom, in the Field, including without limitation the right to design, develop, host and maintain the official website based on, and incorporating elements from, the Property (the ‘Site’)” The Standard Terms and Conditions further provides, “[Plaintiff] and [Monowise] agree to collaborate in the development, creation, production and exploitation of an online show, or shows, based on the Property or any elements therefrom (the ‘Show’) to be featured as part of the programming incorporated into the Site.”

The Standard Terms and Conditions included a paragraph designated “Additional Exploitations.” (Orig. underscore.) That paragraph provides as follows: “[Plaintiff] shall have the right, but not an obligation, to create, develop and exploit, or

sublicense to third parties the right to create, develop and exploit, other works derived from, based on, incorporating elements of or connected with the Property, including without limitation live action and animated programs (other than the Show, the Site, or any on-line exploitation of the Property) or other off-line works, as well as the right to make sequels, remakes, spin-offs and derivative works of any such works (collectively, ‘Additional Exploitations’). All creative decisions regarding the Additional Exploitations shall be subject to the mutual approval of [plaintiff] and [Monowise], such approval not to be unreasonably withheld. All material business decisions regarding the Additional Exploitations, including without limitation the right to enter into agreements with third parties providing such third parties with the right to exploit such Additional Exploitations, shall be subject to mutual approval, such approval not to be unreasonably withheld. All proprietary rights in and to the Additional Exploitations shall be owned in accordance with paragraph 8 [regarding ownership] of this Agreement. All compensation for [plaintiff] and [Monowise] with respect to the Additional Exploitations shall be as set forth in paragraph 11 [concerning revenue sharing and compensation] below. [Plaintiff] shall have the right, but not an obligation, to exploit the Additional Exploitations outside of the Field; provided, that any such exploitation of the Additional Exploitations shall be subject to the mutual approval of both parties, such approval not to be unreasonably withheld. . . .” (Orig. underscore.) The duration of the agreement was 3 years, 90 days. However, the agreement provided that certain paragraphs thereof, including paragraph 6—“Additional Exploitations”—“shall survive the termination or expiration of this Agreement.”

C. Plaintiff’s Complaint Against Defendants

Plaintiff alleged in part as follows: “In 1999 defendant OZZY OSBOURNE was a ‘heavy metal’ musician best known for his role in the group Black Sabbath. He

continued to have a following at his music festivals known as ‘Ozzfests.’ He was highly controversial, and [the] parents of one boy had sued him, claiming that OZZY OSBOURNE’s music led to their son’s suicide. The lawsuit was dismissed because of OZZY OSBOURNE claiming protection under the First Amendment to the U.S. Constitution. But that lawsuit and his history of biting off the heads of small animals on stage did not make him a beloved family figure in much of the United States. [¶] . . . In the early part of 2000, [plaintiff] recognized the potential for expanding other aspects of the Ozzy Osbourne experience, including a surprisingly attractive though at first blush unconventional family life. [¶] . . . Plaintiff first met with defendant SHARON OSBOURNE on or about January 28, 2000, and suggested several ideas for increasing the entertainment reach of the Osbournes, including, even at that date, focusing on the attractive aspects of Osbourne family life, and placing cameras in the Osbourne house. [¶] . . . Discussions between Plaintiff and defendant SHARON OSBOURNE and the Osbourne interests continued throughout 2000. Plaintiff, MONOWISE and the Osbourne interests were actively represented by counsel during this period. [¶] . . . Finally, on December 13, 2000, [the parties entered into the agreement that is the subject of this action]. [¶] . . . [¶] After the signing of the December 13, 2000 agreement [plaintiff] described to MONOWISE and Sharon Osbourne the live action family based TV show that later became the MTV hit. Sharon Osbourne told Plaintiff she was not interested in having TV cameras in the Osbourne house. Following that conversation the Osbourne interests negotiated with MTV exactly the TV show that Plaintiff had described” (Orig. capitalization.)

Plaintiff alleged defendants breached the agreement and engaged in unfair competition by negotiating with MTV to produce what ultimately became the successful Osbourne television show. Plaintiff sought, among other things, declaratory relief to the effect, “[It] is the owner of all ‘right, title and interest’ of all Additional Exploitations, including but not limited to the MTV Osbournes Television Show and all derivatives therefrom”

D. Defendants' Judgment on the Pleadings Motion

Defendants filed a judgment on the pleadings motion as to the causes of action asserted against them—the fifth (contract breach), sixth (unfair competition), and seventh (declaratory relief). They argued in part that the agreement was limited to exploitation on the Internet of Mr. Osbourne's name, image, and the like solely in connection with "Ozzfest." The trial court granted the judgment on the pleadings motion. The trial court found the agreement excluded "traditional, offline exploitations." The exclusion included "broadcast television [and] non-interactive cable television." The trial court further concluded: "It requires a leap-of-faith from a non-existent platform (which this Court is unwilling to make) to accept Plaintiff's reading of the Agreement and interpret and expand the language of paragraph 6 (Additional Exploitations) to *include* a television show which is in no way connected with ' . . . the concert tour known as "Ozzfest" (PROPERTY)'." The trial court held: "Both the sixth and seventh causes of action depend upon the validity and viability of the fifth cause of action, since they are based upon the same claimed but non-existent contract rights. [¶] Although Plaintiff has made what the Court takes to be a good faith representation that if granted leave, it can amend its Complaint, the Court accepts and agrees with Defendants' rejoinder that a cause of action could only be stated by Plaintiff by amending the . . . Agreement, not the Complaint. Such simply cannot be done." The trial court granted the judgment on the pleadings motion as to the sixth and seventh causes of action finding no contract breach was alleged. The court stated: "Both the sixth and seventh causes of action depend upon the validity and viability of the fifth cause of action, since they are based upon the same claimed but non-existent contract rights."

III. DISCUSSION

A. Judgment on the Pleadings Motion Standard of Review

A motion for judgment on the pleadings may be made on the ground that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim. (Code Civ. Proc., §§ 438, subd. (c)(1)(B)(ii), 430.10, subd. (e); *Colberg, Inc. v. State of California ex rel. Dept. of Pub. Wks.* (1967) 67 Cal.2d 408, 411-412; *Sofias v. Bank of America* (1985) 172 Cal.App.3d 583, 586; *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 877.) Our analysis in this case is guided by the same rules governing the review of the sustaining of a general demurrer. (*Smiley v. Citibank, supra*, 11 Cal.4th at p. 146; see *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 516.) The Supreme Court has defined that standard of review as follows: “‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; accord *Rangel v. Interinsurance Exchange* (1992) 4 Cal.4th 1, 7.) More specifically with respect to a judgment on the pleadings motion, the Supreme Court has held: “[W]e treat the properly pleaded allegations of [the] complaint as true, and also consider those matters subject to judicial notice. (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710,

714-715, fn. 3 []; *Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 440 []; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 815 [].) ‘Moreover, the allegations must be liberally construed with a view to attaining substantial justice among the parties.’ (*Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1508 []). ‘Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.’ (*Ibid.*)” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232.)

B. Contract Construction

The central question in this case is whether the entire agreement can be construed to grant plaintiff any potential rights with respect to a television show featuring the Osbournes’ family life. At the judgment on the pleadings motion hearing, plaintiff’s counsel agreed with the trial court’s assessment of the crux of the issue—whether the Additional Exploitations provision of the Standard Terms and Conditions granted plaintiff rights beyond those delineated in the Intellectual Property Rights Agreement. Plaintiff’s counsel explained, “It is absolutely true that within the field, within the field on the main contract, that the field does not include the television show.”

We apply the following well established rules of contract interpretation. In *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608, the California Supreme Court held: “‘Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The “clear and explicit” meaning of these provisions, interpreted in their “ordinary and popular sense,” unless “used by the parties in a technical sense or a special meaning is given to them by usage” (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a layperson would ascribe to

contract language is not ambiguous, we apply that meaning. [Citations.]’ (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807, 821-822.)” Citing Civil Code sections 1647 and 1648, the California Supreme Court has explained: “[A] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates’ [citation]. ‘However broad may be the terms of a contract, it extends only to those things . . . which it appears that the parties intended to contract.’ [Citation.]” (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.) Quoting Civil Code section 1649, the Supreme Court has explained, “‘If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.’” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.) If an ambiguity exists, extrinsic evidence is admissible to aid in interpretation of the contract. (Code Civ. Proc., § 1856, subd. (g); *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351; *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555.) The threshold question whether an ambiguity exists—that is, whether the contract language is reasonably susceptible to the meanings urged by the parties—is a question of law subject to de novo review. (*California Teachers Assn. v. Governing Bd. of Hilmar Unified School Dist.* (2002) 95 Cal.App.4th 183, 189; *Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166.) The Supreme Court has held: “A [contract] provision is ambiguous when it is susceptible to two or more reasonable constructions. (*Waller [v. Truck Ins. Exchange, Inc.]* (1995)] 11 Cal.4th [1,] 18 [.] Language in [a contract] is ‘interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.’ (*Ibid.*) ‘The proper question is whether the [provision or] word is ambiguous in the context of *this* [contract] and the circumstances of *this* case.’” (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.)

1. “in connection with the concert tour known as ‘Ozzfest’”

Plaintiff contends, “[T]he trial court erroneously construed the definition of Property as being limited solely to intellectual property connected with the concert tour known as ‘Ozzfest.’” Plaintiff argues: “Contrary to the trial court’s ruling, the Agreement broadly defined Property as follows: ‘Ozzy Osbourne’s name, likeness, image, identity, persona, trademarks and right of publicity, *and* all intellectual property connected with the concert tour known as “Ozzfest”’ . . . As used in such a list, the word ‘and’ is a word of expansion, not one of limitation. . . . [¶] The trial court erroneously concluded that the words ‘connected with the concert tour known as “Ozzfest”’ were ‘words of limitation’ that modified the meaning of all the preceding items on the list. . . . This is not a plausible reading of the contract. [Fn. omitted.] Under the ‘last antecedent rule’ applicable to both statutory and contract interpretation, qualifying words, phrases, or clauses are to be applied only to the immediately preceding words or phrases, and are not to be construed as extending to or including others more remote. [Citations.] Under this basic rule of construction, the words ‘connected with the concert tour known as “Ozzfest”’ applied only to the immediately preceding words ‘all intellectual property’; they did not modify the entire list of items preceding this whole phrase. Thus, the Agreement was not limited solely to intellectual property connected to Ozzfest—it applied more generally to any use of ‘Ozzy Osbourne’s name, likeness, image, identity, persona, trademarks and right of publicity’”

Defendants disagree. They contend the last antecedent rule is inapplicable where several words are followed by a clause that applies equally to the first and other words as to the last. Defendants argue: “This is precisely the case here. Plaintiff does not, and cannot, explain how the limiting words ‘connected with the concert tour known as “Ozzfest”’ sensibly could be read to apply only to the generic clause ‘all intellectual property,’ and not all of the particular intellectual property rights

surrounding that clause” (Orig. underscore.) Defendants contend it would be “completely absurd” to interpret the agreement to not only give plaintiff the exclusive right to Mr. Osbourne’s likeness and other intellectual property associated with the Ozzfest tour, but also the exclusive right to control Mr. Osbourne’s use of his own name and likeness. Defendants reason, and the trial court ruled, that the agreement does not grant plaintiff any rights to that which ultimately became the MTV television show.

At issue is the application of the last antecedent rule. The last antecedent rule applies equally to statutory and contractual construction. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 529; *Anderson v. State Farm Mut. Auto. Ins. Co.* (1969) 270 Cal.App.2d 346, 349.) In a case involving construction of a statute the Supreme Court held: “A longstanding rule of statutory construction—the ‘last antecedent rule’—provides that ‘qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.’ (*Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389 []; accord *People v. Corey* (1978) 21 Cal.3d 738, 742 []). . . . [¶] . . . [¶] There are two exceptions to the ‘last antecedent rule,’ . . . The first exception provides that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” (*Wholesale T. Dealers v. National etc. Co.* (1938) 11 Cal.2d 634, 659 []; accord *People v. Corey, supra*, 21 Cal.3d 738, 742.) [¶] . . . [¶] The second exception to the ‘last antecedent rule’ provides that “[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding words . . . , [its application] will not be restricted” (2A Sutherland, *Statutory Construction* (4th ed. 1973) § 47.33, p. 159; see *People v. Knowles* (1950) 35 Cal.2d 175 []). This is, of course, but another way of stating the fundamental rule that a court is to construe a statute “so as to effectuate the purpose of the law”.’ (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679 [])

[, disapproved on another point in *Frink v. Prod* (1982) 31 Cal.3d 166, 180].) ‘Where a statute is theoretically capable of more than one construction [a court must] chose that which most comports with the intent of the Legislature.’ (*California Mfrs. Assn. v. Public Utilities Com.* [(1979)] 24 Cal.3d [836,] 844.)” (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680-681; accord, *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743-744.)

Punctuation may also provide a clue to the meaning of statutory or contractual language. (*White v. County of Sacramento, supra*, 31 Cal.3d at p. 680; *Garcetti v. Superior Court* (2000) 85 Cal.App.4th 1113, 1120.) As the Supreme Court held in *White v. County of Sacramento, supra*, 31 Cal.3d at page 680, “Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma. (*Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920, 927-928, fn. 4 [.])” In *White*, the qualifying phrase was not set off from the preceding terms by a comma. The Supreme Court concluded, “Thus, application of the ordinary rules of statutory construction strongly suggests that the phrase ‘for purposes of punishment’ was intended to modify only the [immediately preceding term,] ‘transfer.’” (*White v. County of Sacramento, supra*, 31 Cal.3d at p. 680.)

The rule of the last antecedent does not in all cases resolve the meaning of ambiguous language. The Supreme Court has held, “Principles of statutory construction are not rules of independent force, but merely tools to assist courts in discerning legislative intent.” (*Renee J. v. Superior Court, supra*, 26 Cal.4th at p. 744.) The Court of Appeal has explained: “A limiting clause is to be confined to the last antecedent, unless the context or evident meaning requires a different construction. [Citations.] . . . [¶] [T]he rule of the last antecedent is merely an aid to construction, applicable only where there exist uncertainties and ambiguities. [Citations.] This merely means, however, that if the clear intent of the parties is opposed to the application of the rule, the rule must yield.” (*Anderson v. State Farm Mut. Auto. Ins.*

Co., *supra*, 270 Cal.App.2d at pp. 349-350.) As the Court of Appeal stated in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 107 Cal.App.4th at page 530, “[T]he last antecedent rule is “not immutable” and should not be ‘rigidly applied’ in all cases. (*In re Phelps* (2001) 93 Cal.App.4th 451, 456 [.]” In *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 520-522, for example, the Supreme Court found that application of the last antecedent rule did not resolve the issue before it. Two equally reasonable competing constructions of the statutory language existed. The Supreme Court held: “In light of these competing arguments, we conclude that the statutory language is ambiguous Therefore, we must now turn to extrinsic aids in an effort to ascertain the Legislature’s intent.” (*Id.* at p. 522.)

The provision at issue is ambiguous. It is susceptible to two reasonable but conflicting constructions as advanced by the parties. It is susceptible to the interpretation that the property in question (“Ozzie Osbourne’s name, likeness, image, identity, persona, trademarks and right of publicity”) is limited to the Ozzfest concert tour. On the other hand, the language at issue is reasonably subject to the construction, as pled in the complaint, that it is not limited to the Ozzfest concert tour. Any of the preceding terms, “Ozzy Osbourne’s name, likeness, image, identity, persona, trademarks and right of publicity” *could* be modified by the phrase “connected with the concert tour known as ‘Ozzfest.’” In addition, the paragraph of the agreement defining “property” makes several references to the Ozzfest concert tour. The context of the language at issue therefore raises a reasonable question whether the parties intended the language “connected with the concert tour known as ‘Ozzfest’” to apply to all of the listed property. On the other hand, the qualifying phrase, “connected with the concert tour known as ‘Ozzfest,’” is not set off by a comma from the preceding terms. This suggests that the qualifying phrase applies only to the immediately preceding term, “intellectual property.” We cannot resolve that ambiguity by reference to the language of the agreement alone. Under these circumstances, the trial

court must consider extrinsic evidence of the parties' intent—evidence not available in connection with a judgment on the pleadings motion.

2. additional exploitations

Plaintiff further contends: “[T]he trial court failed to distinguish between the separate bundles of rights granted to [plaintiff] by the Agreement: (1) the exclusive license in the Field of online media; and (2) the Additional Exploitations, which were *not* limited to online media. As a result, plaintiff reasons, the trial court mistakenly concluded, ‘[T]he Agreement specifically and expressly denies to Plaintiff *any* rights to a reality-based television show.’” (Orig. italics.) Defendants agree that the Additional Exploitations provision grants plaintiff a non-exclusive right “to develop and exploit projects outside the ‘Field.’” Defendants also agree this right is subject to the parties’ mutual approval. Nevertheless, defendants argue: “Plaintiff’s argument must fail because it would nullify the Agreement’s exclusion of television rights from the ‘Field’ of its grant of exclusive rights. In other words, Plaintiff’s argument would give it exclusive rights to a television program under a contract that expressly prohibits the assertion of exclusive television rights. To avoid this impermissible interpretation of the Agreement, the ‘Additional Exploitations’ provision must be read, in accordance with its plain and unambiguous terms, to grant Plaintiff a non-exclusive right to create or develop additional works—a ‘right’ Plaintiff cannot assert here because it did not create or develop ‘The Osbournes.’” (Orig. underscore.) Defendant reasons that: plaintiff was granted exclusive rights with respect to property within a narrowly defined “field”; that field did not include broadcast or non-interactive cable television; to read the Additional Exploitations provision to grant any right with respect to “The Osbournes” television show would render the field restriction meaningless; further, as the holder of a *non-exclusive* right as to off-line forums, plaintiff cannot challenge Monowise’s decision to grant rights to a third party (MTV);

the Additional Exploitations provision unambiguously requires that plaintiff “actually create and develop” “an actual work” (orig. underscore) as a prerequisite to obtaining any right in an additional exploitation, and plaintiff did not create or develop “The Osbournes”; and under the plain and unambiguous language of the Additional Exploitations provision, it has no application where a work is created by others.

As noted above, the “Additional Exploitations” provision states in part: “[Plaintiff] shall have the right . . . to create, develop and exploit . . . other works derived from, based on, incorporating elements of or connected with the Property, including without limitation . . . other off-line works [Plaintiff] shall have the right . . . to exploit the Additional Exploitations outside of the Field; provided, that any such exploitation of the Additional Exploitations shall be subject to the mutual approval of both parties, such approval not to be unreasonably withheld. . . .” Additionally, the “Additional Exploitations” paragraph provides: “All creative decisions regarding the Additional Exploitations shall be subject to the mutual approval of [plaintiff] and [Monowise], such approval not to be unreasonably withheld. All material business decisions regarding the Additional Exploitations, including without limitation the right to enter into agreements with third parties providing such third parties with the right to exploit such Additional Exploitations, shall be subject to mutual approval, such approval not to be unreasonably withheld.” Contrary to defendants’ assertion, plaintiff does not allege an *exclusive* right with respect to the television show. Rather, liberally construed (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1232; *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486), the complaint alleges: plaintiff proposed the creation of a television show featuring the Osbourne’s home life; Ms. Osbourne rejected the idea stating she did not want television cameras in her home; and the Osbournes then negotiated and concluded a contractual arrangement with MTV to produce precisely the type of show plaintiff had proposed. In other words, defendants allegedly unreasonably withheld their approval of the proposed additional exploitation in a non-Internet forum and

entered into an agreement with MTV. The additional exploitation with MTV occurred without plaintiff's approval. The plain language of the Additional Exploitations provision does not clearly preclude this theory of recovery, i.e., defendants unreasonably withheld their approval of the proposal that ultimately was aired by MTV. Defendants claim plaintiff has not and cannot allege that it created and developed a work that was an Additional Exploitation. Defendants' argument ignores the allegation that plaintiff *created* and sought to *develop* the idea for the television show that MTV ultimately aired.

Defendants also contend the trial court properly found that the Additional Exploitations provision did not expand, enlarge, or override the limiting language of the Property and Field provisions of the Intellectual Property Rights Agreement. We disagree. The Intellectual Property Rights Agreement granted plaintiff certain exclusive rights. The Additional Exploitations provision granted plaintiff certain nonexclusive rights including, expressly, rights with respect to "off-line works" and exploitations "outside of the Field." The Additional Exploitations provision granted plaintiff rights with respect to "works derived from, based on, incorporating elements of or connected with the Property" as described in the Intellectual Property Rights Agreement. The plain terms of the Additional Exploitations provision extend beyond the limited field (the Internet) and the property as to which exclusive rights were granted by the Intellectual Property Rights Agreement.

Defendants argue that the television show "implicates intellectual property rights of individual Osbourne family members" who are not parties to the Intellectual Property Rights Agreement and the incorporated Standard Terms and Conditions. Hence, defendants argue, plaintiff could not secure the rights it claims under the agreement. To begin with, this issue is not resolvable at the judgment on the pleadings stage. In any event, under the plain terms of the Additional Exploitations provision, plaintiff could propose such a project, the Osbournes could agree to it, and it could be the subject of a further agreement. In other words, plaintiff does not argue the

agreement gave it the right to produce such a television show without negotiating with parties other than Monowise. Rather, plaintiff contends it had the right to propose such a project, and with Monowise's approval, to create and develop a television show. The project itself could be the subject of contractual understandings separate from the present agreement.

One final thought is in order concerning the Additional Exploitations paragraph in the Standard Terms and Conditions attached to the Intellectual Property Rights Agreement. The Additional Exploitations paragraph in the Standard Terms and Conditions prohibits any of the parties from "unreasonably" withholding their approval from the development of additional programming "derived from, based on, incorporating elements of or connected with the Property," which is potentially defined in the Intellectual Property Rights Agreement as literally anything having to do with Mr. Osbourne. The complaint does not explicitly allege that defendants unreasonably withheld their consent to developing new non-Internet programming. But that does not warrant affirming the judgment on the pleadings order. As noted previously, the complaint alleges that the Additional Exploitations paragraph twice recites that defendants' consent could not be unreasonably withheld. Further, the complaint alleges with some specificity that plaintiff suggested a television show to Monowise and Ms. Osbourne. Ms. Osbourne said she did not want to have television cameras in the Osbourne residence. Following that discussion it is alleged defendants then negotiated with representatives of MTV and thereafter agreed to the very program suggested by plaintiff. The complaint also alleges defendants breached the Standard Terms and Conditions attached to the Intellectual Property Rights Agreement. Under these circumstances, the complaint, when liberally construed, contains allegations defendants unreasonably withheld their consent to a proposed television program that fell within the scope of the Additional Exploitations paragraph in the Standard Terms and Conditions document. No further pleading was necessary. (*Poirier v. Gravel* (1981) 88 Cal. 79, 82; *Wise v. Southern Pac. Co.* (1963) 223 Cal.App.2d 50, 60,

disapproved on another point in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 521, fn. 10.)

3. the individual defendants

Defendants argue that even if we find a contract breach cause of action is stated, we should affirm the order granting judgment on the pleadings as to the individual defendants—Mr. and Ms. Osbourne—because they are not parties to the agreement. Defendants assert in part: “When it appears on the face of a contract that it is entered into on behalf of the corporation ‘by’ its agent, only the corporation, not the agent, may be liable on the contract. [Citation.]” Defendants reference their request for judicial notice in the trial court and contend, “Monowise is organized as a corporation in accordance with English law”; further, under both American and English law, the liability of a corporation does not attach to its owners. Plaintiff argues, and we agree, that the complaint alleges Monowise is a California partnership and the Osbournes are its principals; further, under California law, partners are jointly and severally liable for the obligations of the partnership. (Corp. Code, § 16306, subd. (a); *Great Western Bank v. Kong* (2001) 90 Cal.App.4th 28, 31.) On appeal from a judgment on the pleadings grant, we must treat the properly pleaded allegations of the complaint as true. (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1232; *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

Defendants asked the trial court to take judicial notice of documents purporting to show that Monowise was incorporated in the United Kingdom and corporate liability does not attach to its owners under British law. Defendants also advert to several articles. The trial court never ruled on that request. On appeal, defendants assert, “[B]ecause it would have been proper for the [trial] court to take judicial notice of these facts, . . . and because [defendants] requested that it do so, this Court on appeal can and should take judicial notice of them. [Citations.]” We agree with

plaintiff that the articles and English documents are not judicially noticeable. (Evid. Code, § 452, subd. (c); *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6.) But even if we were to consider these documents—the result would be the same. There is no judicially noticeable evidence that the alleged California partnership does not exist. Certainly, there is evidence a corporation exists in the British Isles with the name Monowise Ltd. But there is no conclusive evidence that proves a California partnership does not exist. Given our analysis in this regard, we need not address agency or other issues.

4. remaining claims

As noted above, defendants' judgment on the pleadings motion was granted without leave to amend as to plaintiff's contract breach, unfair competition, and declaratory relief causes of action. The trial court ruled that defendants violated none of plaintiff's contractual rights. Further, the trial court concluded the remaining unfair competition and declaratory relief claims were derivative of the alleged contract breach cause of action. (We agree with the trial court's analysis in this regard.) Hence, the trial court decided that the unfair competition and declaratory relief claims were likewise without merit. As discussed above, we conclude there was a valid cause of action for contract breach stated. Therefore, the causes of actions for unfair competition and declaratory relief must be reinstated along with the contract breach claim.

IV. DISPOSITION

The judgment of dismissal is reversed. On remand, the trial court is directed to vacate its order granting judgment on the pleadings as to defendants, Monowise, Ltd., John Osbourne, and Sharon Osbourne, and enter a new order denying that motion.

Plaintiff, Threshold.TV, Inc., is to recover its costs on appeal, jointly and severally, from defendants, Monowise, Ltd., John Osbourne, and Sharon Osbourne.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.